

IN RE MARINE SHALE PROCESSORS, INC.

RCRA Appeal No. 94-12

FINAL DECISION AND ORDER

Decided March 17, 1995

Syllabus

By petition dated October 20, 1994, Marine Shale Processors, Inc. ("MSP") requested that the Environmental Appeals Board review the decision of Region VI denying MSP's application for a RCRA permit for MSP's facility in Amelia, Louisiana. MSP had sought a permit to operate as an industrial furnace under the Boilers and Industrial Furnace ("BIF") Rule. 40 C.F.R. Part 266 (Subpart H); 56 Fed. Reg. 7134 (February 21, 1991). By order dated December 7, 1994, the Board granted MSP's petition for review and scheduled oral argument. Oral argument was held on January 12, 1995.

MSP's facility consists of, among other things, a rotary kiln, two hazardous waste-fired oxidizers, a "slag box," a baghouse, and an emissions stack. The facility receives and burns hazardous waste from a large variety of sources and, according to MSP, produces a useful product from these wastes, which MSP calls "aggregate." According to MSP, this "aggregate" is the result of a patented manufacturing process that uses thermal treatment to accomplish the recovery of materials or energy. In addition, MSP asserts that its "aggregate" constitutes a legitimate product which can be sold to interested parties for a variety of uses. MSP asserts that, as an aggregate kiln, it meets the definition of an industrial furnace at 40 C.F.R. § 260.10 and is therefore entitled to a BIF permit. Thus, although MSP has operated the facility since July 1985, MSP claims that it was exempt from obtaining an incineration permit for its kiln until 1991 and promulgation of the BIF rule.

Prior to August 21, 1991, the date on which the BIF rule became effective, combustion facilities, such as aggregate kilns, that were engaged in legitimate recycling operations were exempt from federal RCRA regulations governing the incineration of hazardous waste for destruction set forth in 40 C.F.R. Part 264, Subpart O. MSP has asserted that, as an aggregate kiln it was not incinerating wastes for destruction but was an industrial furnace engaged in legitimate recycling, and thus exempt from Part 264. The pre-BIF regulations, however, did not specify which activities by so-called industrial furnaces constituted legitimate recycling rather than incineration for purposes of waste destruction. The Agency therefore developed certain criteria to determine whether a facility was burning hazardous waste for destruction, and was therefore subject to regulation as an incinerator under 40 C.F.R. Part 264 Subpart O, or was engaged in legitimate recycling and therefore exempt from the standards applicable to incinerators. These criteria are referred to by the Agency as the "sham recycling criteria." Among the factors the Agency considered relevant in determining whether a facility was a sham or a legitimate recycler were: 1) whether a hazardous waste was ineffective or only marginally effective for the claimed use; 2) whether a hazardous waste was used in excess of the amount necessary to make a product; 3) whether the material burned was as effective as the material it was replacing; 4) whether sufficient records were kept documenting recy-